

Decision No. R04-0194

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03G-493CP

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

AMERISHUTTLE AND/OR BLUE SKY SHUTTLE,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
ASSESSING CIVIL PENALTY**

Mailed Date: February 25, 2004

Appearances:

Reinhard Wolf, Commission Staff, for Staff of the Commission;
and

Aaron Jacoby, Esq., for Respondent Amerishuttle and/or Blue Sky
Shuttle.

I. STATEMENT

1. The issuance of Civil Penalty Assessment Notice No. 28382 (the CPAN) commenced this proceeding. The CPAN alleges that, on October 24, 2003, Amerishuttle and/or Blue Sky Shuttle (Respondent or Amerishuttle) twice knowingly violated 21 *Code of Federal Regulations* (C.F.R.) § 396.11(a) (1998), incorporated by reference and made applicable in Colorado by Rule 4 *Code of Colorado Regulations* (CCR) 723-15-2.1. The CPAN further alleges that, on November 3, 2003, Respondent once knowingly violated 21 C.F.R. § 393.75(b)

(1998) and once knowingly violated 21 C.F.R. § 393.75(c) (1998), each incorporated by reference and made applicable in Colorado by Rule 4 CCR 723-15-2.1. Commission Staff (Staff) seeks a civil penalty in the amount of \$1,200.

2. On December 23, 2003, the Commission issued its Order Setting Hearing and Notice of Hearing establishing a hearing date of January 26, 2004, at 9:00 a.m., in this docket.

3. At the assigned place and time the undersigned Administrative Law Judge (ALJ) called the matter for hearing. Mr. Reinhard Wolf, a Compliance Officer in the Commission's Transportation Section, testified on behalf of Staff. Mr. Jason Greenstein, President of Amerishuttle, testified on behalf of Respondent. During the course of the hearing, Hearing Exhibit Nos. 1 through 4 were identified and admitted into evidence.

4. At the conclusion of the hearing, the evidentiary record was closed. The ALJ took the matter under advisement.

5. In accordance with § 40-6-109, C.R.S., the undersigned ALJ now transmits to the Commission the record and hearing exhibits in this proceeding along with a written recommended decision.

II. FINDINGS OF FACT, DISCUSSION, AND CONCLUSIONS

6. The CPAN in this proceeding alleges two violations of 21 C.F.R. § 396.11(a) (1998), one violation of 21 C.F.R. § 393.75(b) (1998), and one violation of 21 C.F.R. § 393.75(c). Amerishuttle and/or Blue Sky Shuttle is the Respondent.

7. Respondent does not dispute the Commission's jurisdiction, and the facts establish the Commission's jurisdiction. The Commission has subject matter jurisdiction over this case and personal jurisdiction over the Respondent in this proceeding.

8. At hearing, Respondent admitted the four alleged violations.

9. Based on the admissions, the ALJ finds and concludes that, on October 24, 2003, Respondent twice knowingly violated 47 C.F.R. § 396.11(a) (1998), incorporated by reference and made applicable in Colorado by Rule 4 CCR 723-15-2.1. For each of these violations, the maximum civil penalty is \$200. *See* Rule 4 CCR 723-15-12.5.

10. Based on the admissions, the ALJ finds and concludes that, on November 3, 2003, Respondent knowingly violated 21 C.F.R. § 393.75(b) (1998), incorporated by reference and made applicable in Colorado by Rule 4 CCR 723-15-2.1. For violation of 21 C.F.R. § 393.75(b) (1998), the maximum civil penalty is \$200. *See* Rule 4 CCR 723-15-12.5. Pursuant to Rule 4 CCR 723-15-12.11.1, Staff seeks an enhanced civil penalty of \$400 for this violation.

11. Based on the admissions, the ALJ finds and concludes that, on November 3, 2003, Respondent knowingly violated 21 C.F.R. § 393.75(c) (1998), incorporated by reference and made applicable in Colorado by Rule 4 CCR 723-15-2.1. For violation of 21 C.F.R. § 393.75(c) (1998), the maximum civil penalty is \$200. *See* Rule 4 CCR 723-15-12.5. Pursuant to Rule 4 CCR 723-15-12.11.1, Staff seeks an enhanced civil penalty of \$400 for this violation.

12. Having found that Respondent violated these provisions as alleged, it is necessary to determine the amount of the civil penalty to be assessed for these violations. In the CPAN, Staff seeks a civil penalty of \$1,200.

13. With respect to the amount of the civil penalty, the evidence establishes, and the ALJ finds, the following facts:

a. Amerishuttle has authority (Certificate of Public Convenience and Necessity (CPCN) PUC No. 52940) issued by the Commission. See Hearing Exhibit No. 1. Respondent originally operated as a transportation carrier only in the mountain area of Colorado.

b. Since May 2003 Amerishuttle has acquired three transportation companies in Colorado (*i.e.*, Peak Transit, Wolf Express, and Blue Sky Shuttle), each of which operated in the Denver metro area or in Colorado Springs. In terms of service area, Amerishuttle is now one of the largest passenger transportation carriers in Colorado and has experienced tremendous growth in revenues during this period. Amerishuttle anticipates continued growth in revenues over (at least) the next year.

c. Mr. Greenstein, Respondent's President, testified that consolidating these transportation operations, beginning to operate in the Denver metro area and in the Colorado Springs area, and bringing the vehicles and records into compliance with Commission regulations has proven to be more time-consuming and more difficult than Amerishuttle anticipated. Mr. Greenstein also testified that the consolidation has not hindered Amerishuttle in doing the repairs necessary to ensure that vehicles are safe when they are in-service (*i.e.*, used to transport passengers). Mr. Greenstein further testified that the safety of its operation is the most important aspect to Amerishuttle.

d. As of October 2003, Blue Sky Shuttle became part of Amerishuttle. Although Mr. Greenstein testified that Amerishuttle "took over" Blue Sky Shuttle, the exact legal relationship between the two companies is not clear from the record. At all times

relevant to this proceeding, however, it is clear that Amerishuttle and Blue Sky Shuttle were the same operation.

e. On November 3, 2003, at Denver International Airport, Staff conducted an inspection of vehicles operated by Amerishuttle. *See* Hearing Exhibit No. 2. Staff inspected 20 vehicles, of which 2 vehicles were found to be out of compliance. Among other violations, the two vehicles were found to have tires which rendered the vehicles unsafe and not road-worthy. As a result, Staff placed each of the two vehicles out of service (*see* Hearing Exhibit Nos. 3 and No. 4) and instructed the drivers that the vehicles could not be used to transport passengers until the violative tires were replaced. On the date they were inspected, the vehicles had been used to transport passengers to Denver International Airport.

f. The violative tires were replaced on each vehicle either on November 3, 2003, or on the next day. There is no evidence that the vehicles were used to transport passengers before the tires were replaced.

g. On November 3, 2003, Staff also inspected Amerishuttle's records. During that inspection Staff was unable to locate required paperwork concerning daily inspection reports on the two vehicles placed out-of-service due to the condition of their tires. There were no daily inspection report records available for the period October 24, 2003 through and including November 2, 2003 (the last full day before the inspection), a period of ten days.

h. Since the November 2003 inspection, Amerishuttle has taken steps to improve its operation and to address the types of violations at issue in this proceeding. On the operational side, Amerishuttle has updated the vehicles in its fleet while retiring older vehicles; has hired more employees to handle the increased administrative and other work attendant to

Respondent's larger size; and is preparing a manual for its drivers. On the recordkeeping side, Respondent has taken steps (*e.g.*, hiring more staff, directing supervisors to make changes in recordkeeping) to assure that required records are filed and maintained. In addition, Respondent has worked with Staff in an effort to come into compliance with applicable rules.

i. On September 22, 2003, Denver Mountain Carrier, Inc., doing business as Denver Mountain Express (DME), and Staff entered into a Stipulation of Settlement of Civil Penalty Assessment Nos. 28249-CPAN and 28302-CPAN. *See* Dockets No. 03G-363CP and No. 03G-376CP. DME operates under CPCN PUC No. 55519. Among the violations alleged in Docket No. 03G-376CP was a violation of 21 C.F.R. § 396.11(a) (1998). Mr. Jason Greenstein signed the stipulation as President of Denver Mountain Express. On November 12, 2003, by Decision No. R03-1278, the stipulation was accepted. Decision No. R03-1278 is now a decision of the Commission.

j. Until its recent acquisitions and growth, Respondent appears to have had a generally good history of compliance with Commission regulations.

k. Respondent did not contest the alleged violations and admitted the violations which occurred on October 24, 2003 and November 3, 2003.

l. It is Staff's practice (followed here) not to issue a civil penalty assessment notice the first time Staff finds a rule violation. The first time a violation is found, Staff informs the carrier of the violation and of the fact that it must come into compliance. Staff provides guidance to the carrier concerning what it needs to do to comply with Commission rules. When the CPAN in this case was issued, it was the second time Staff had found that

Respondent had violated each rule. Respondent admitted that Staff had discussed with it the rules and requirements at issue here on at least one prior occasion.

14. Before determining the civil penalty to be assessed in this matter, the ALJ must address Staff's request that the civil penalty for the two violations of 21 C.F.R. § 396.11(a) (1998) be doubled pursuant to Rule 4 CCR 723-15-12.11.1.

15. Rule 4 CCR 723-15-12.11 implements § 40-7-113(3), C.R.S. Rule 4 CCR 723-15-12.11.1 states (emphasis supplied):

If any *person* receives a second civil penalty assessment for a violation of [the Rules Regulating Safety for Motor Vehicle Carriers and Establishing Civil Penalties] as set forth in Rules 723-15-12.1 through 723-15-12.7 within one year after the first violation, the civil penalty assessed for such second violation may be two times the amount specified in Rules 723-15-12.1 through 723-15-12.7.

16. Section 40-1-102(5), C.R.S., defines "person" as "any individual, firm, partnership, corporation, company, association, joint stock association, and other legal entity." *See also* § 40-10-101(5), C.R.S. (to the same effect).

17. In this case Staff bears the burden of proof by a preponderance of the evidence. *See* Rule 4 CCR 723-1-82(a). To meet its burden of proof with respect to enhancing the amount of the civil penalties in this case, Staff must establish that, within the 12 months preceding issuance of the CPAN in this case, Respondent violated 21 C.F.R. § 396.11(a) (1998). Staff did not meet this burden of proof.

18. In seeking enhanced penalties, Staff relies upon Docket No. 03G-376CP. Decision No. R03-1278, entered in that docket, assessed against DME a civil penalty for violation of 21 C.F.R. § 396.11(a) (1998), as provided in Rule 4 CCR 723-15-12.5. There is no evidence that Respondent is the same "person" as DME. First, it appears that the two companies

are separate entities and do not operate under the same CPCN. Second, Mr. Jason Greenstein is the President of both companies. That fact, however, is insufficient to establish that the two entities are the same “person,” as required by Rule 4 CCR 723-15-11.1 and § 40-7-113(3), C.R.S. Third, Mr. Greenstein testified about the failure of DME to pay the assessed civil penalty. That fact, however, is insufficient basis upon which to find that Respondent and DME are the same “person.” Fourth and finally, that Respondent admitted the substantive violations does not mean that Respondent admitted to being the same “person” as DME. In fact, Respondent admitted the violations and then challenged the amount of the civil penalty to be assessed.¹

19. Staff failed to establish the basis for enhanced civil penalties in this case when it failed to establish that *Respondent* violated 21 C.F.R. § 396.11(a) (1998) within the 12 months preceding issuance of the CPAN at issue in this case. As a result, pursuant to Rule 4 CCR 723-15-12.5, the maximum civil penalty for the four admitted violations in this case is \$800.

20. Based on the foregoing findings of fact and discussion, the ALJ concludes that \$650 is the appropriate civil penalty amount to be assessed in this case. In making this determination, the ALJ began with the maximum civil penalty for these violations (*i.e.*, \$800); considered Commission guidance provided in previous civil penalty cases; considered the purposes of civil penalties; considered the factors in aggravation and in mitigation; and considered the range of civil penalty assessments found to be reasonable in other cases.

21. In aggravation of the civil penalty amount, the ALJ considered Respondent’s knowing violations and the previous efforts of Staff to bring Respondent into compliance with

¹ Respondent did not address the issue of whether Amerishuttle and DME are the same “person” within the meaning of the rule and statute.

applicable regulations.² The ALJ also took into account the seriousness of the violations alleged, particularly the fact that the violative tires rendered the vehicles unsafe. Further, while Respondent professed an interest in safety, its actions (*i.e.*, its failure to require daily inspection reports to be filed and its operating vehicles with violative tires) speak louder than words and provide strong evidence to the contrary. Moreover, the ALJ considered Respondent's substantial increase in revenues. Respondent had the funds available to comply with the rules. After Staff informed Respondent of the rule violations, Respondent had the funds available immediately to implement remedial actions (since undertaken) necessary to assure compliance. Finally, the ALJ considered that the CPAN addresses only one day (*i.e.*, October 24, 2003) out of the ten days for which no daily inspection records could be found for the vehicles in question.

22. In mitigation of the civil penalty amount, the ALJ considered Respondent's admission of the violations; Respondent's remedial actions (detailed above) since issuance of the CPAN; and Respondent's stated willingness to continue to work with Staff to make improvements. In addition, the ALJ took into consideration Respondent's rapid growth and the difficulties attendant to consolidating the operations of four carriers. Finally, the ALJ took into consideration the fact that, prior to the growth, Respondent's record of compliance appears to have been good.

23. For these reasons, the ALJ determines that a civil penalty in the amount of \$650 should be assessed for these admitted violations.

24. The ALJ finds that the assessed civil penalty achieves the following purposes underlying civil penalty assessments: (a) deterring future violations, whether by other similarly-

² When the CPAN issued, it was the second time Staff had found Respondent in violation of each rule.

situated carriers and by the named respondent; (b) motivating Respondent to come into compliance with the law; and (c) punishing Respondent for its past illegal behavior. Assessing a civil penalty of a significant amount (*i.e.*, \$650) underscores the seriousness of the violations which occurred and should act as a deterrent. The civil penalty and CPAN also trigger increased civil penalties. *See* §§ 40-7-113(3) and 113(4), C.R.S. Assessing a civil penalty serves to punish Respondent for its past illegal behavior.

25. Pursuant to § 40-6-109, C.R.S., the ALJ recommends that the Commission enter the following order.

III. ORDER

A. The Commission Orders That:

1. A civil penalty is assessed against Respondent Amerishuttle and/or Blue Sky Shuttle in the amount of \$650.

2. Within ten days of the date on which this Recommended Decision becomes the Decision of the Commission, Respondent shall pay a civil penalty of \$650 to the Commission.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own

motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Recommended Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge

